80-902

No. .....

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In the Matter of the Application for Admission to the New York State Bar of

FRANCIS G. FLEMING,

Appellant.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

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Attorney for Appellant

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PAUL S. EDELMAN
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I. Questions Presented

1. Can a State, in the exercise of discretion, summarily and arbitrarily deny the application of an attorney for admission to the Bar without examination (based upon his admission for five years in another state) without informing him of the basis of the denial and in the absence of guidelines limiting the exercise of discretion?

2. If the unarticulated reason for a State's denial of an attorney's admission to the Bar is his *residence* while admitted in another state, is not this criterion substantively unrelated to any governmental interest of the State and an improper reason for denying licensure, particularly when residence is specifically exempted as a criterion if the attorney is employed by the federal government?

3. If the unarticulated reason for the State's denial of an attorney's admission to the Bar is his *residence* while admitted in another state, does not utilization of such a criterion by the State impermissively chill the right to relocate among the several states?

4. Does not a State unconstitutionally discriminate against interstate commerce if it refuses licensure to an attorney who, while admitted in Pennsylvania and Arizona, actually practices and is employed in New York, if the State would grant licensure to that attorney if he resided where admitted and chose not to accept out of state employment?

II. Parties

The decision appealed was rendered by the New York Court of Appeals in appellant's *ex parte* and unopposed application for an order required for his admission to the Bar of the State of New York. There were no adverse parties below; 28 U.S.C. § 2403 may be applicable.

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ON APPEAL FROM THE NEW YORK COURT OF APPEALS

JURISDICTIONAL STATEMENT

IV. Opinions Below

Notice of the decision of the New York Court of Appeals is attached hereto as part of the Appendix. See Appendix at 1a and 4a. No official or unofficial opinion or report has been issued or published by the New York Court of Appeals. The decision was communicated to appellant by the Clerk of the New York Court of Appeals in correspondence dated July 14, 1980 and, after appellant's request for rehearing, by letter dated September 4, 1980. See Appendix at 1a and 4a.

V. Statement of Jurisdiction

A. Nature of Proceeding

This appeal involves the denial of appellant's application for an order needed to obtain admission to the Bar of

New York State.[1] Pursuant to *N.Y. Judiciary Law*, § 90(b), an attorney who has been admitted for at least five years to the highest court of another state or common law jurisdiction, and who possesses the requisite character and moral fitness, "shall" be admitted to the New York State Bar on motion without examination upon compliance with the Rules of the New York Court of Appeals. See Part VI *infra*.

The pertinent rules provide that an attorney must:

1. be over 26 years of age,

2. have the equivalent of the legal education needed to qualify him to take the bar examintion,

3. be admitted to practice in the "highest law court" of another state or common law jurisdiction, and

4. *while admitted* to practice, has *actually practiced* for a period of at least five years either:

   a. in the highest law court where admitted;

   b. in federal legal service;

   c. in legal service to a corporation; or

   d. "in a combination or cumulation of service among the above categories of practice or legal service, even if the government service, civilian or military, was not in a jurisdiction in which the applicant was admitted to practice, where the Court of Appeals has determined that such five years of combined or cumulative service is the *equivalent* of the practice [described in subpart (a)]." 22 N.Y.C.R.R. § 520.7(a)(2)(i)(d).[2] (emphasis added)

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[1] The order sought was a prerequisite for admission. Refusal to issue the order amounts to a denial of admission. See Part VI, *infra*.

[2] The rules also provide for admission without examination for full time law school faculty members who have achieved the rank of professor or associate professor without regard to residence.

Appellant was admitted to practice in the Supreme Court of Pennsylvania on November 18, 1974, but his "actual practice" consisted of:

1. approximately 10½ months (following admission) as a law clerk for a Senior U.S. District Court Judge;

2. approximately 15 months as an Assistant Attorney General for the State of Arizona (12 of which occurred after his admission in Arizona);

3. approximately 30 months as a full time Associate in a law firm located in Phoenix, Arizona (all of which occurred subsequent to his admission in Arizona); and

4. five and one-half months as a full time Associate in his present New York law firm where he actually practiced in numerous federal and state (including Arizona and Pennsylvania) courts, and administrative agencies.

A verified application was submitted to the New York Court of Appeals on June 30, 1980, see Appendix at 8a-11a, along with affidavits of the appellant's employers and supervisors, detailing the qualitative nature of the applicant's experiences. The application sought a determination that appellant's combined experience was the "equivalent" of actual practice in Pennsylvania.[3]

The application was denied. No hearing, argument or interview was conducted. No basis for the denial, despite a specific request, was given. This appeal followed.

B. There is No Opinion

No formal judgment, order or opinion was entered despite appellant's specific request for one (See Appendix

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[3] Inasmuch as New York now utilizes the Multi-State Exam, the application alternatively requested that the Court consider appellant's previous Multi-State Bar Exam scores. This request was also denied.

at 3a). The Clerk of the New York Court of Appeals simply informed appellant that the application had been denied by letter dated July 14, 1980. See Appendix at 4.

Thereafter, appellant requested reconsideration of the decision on August 14, 1980, and also requested that if the application was again denied, some articulation of the reasons be given and a formal order or judgment be en-
denied by letter dated July 14, 1980. See Appendix at 4a.
tered (See Appendix at 2a-3a). The final decision was communicated by letter dated September 4, 1980. See Appendix at 1a. A Notice of Appeal was filed on November 26, 1980 with the Clerk of the New York Court of Appeals, along with proof of service upon each of the Judges of the Court and the New York Attorney General. See Appendix at 5a-7a.

C. Jurisdiction of this Court is based upon 28 U.S.C. § 1257(2)

1. A Court Rule is a State Statute for Purposes of this Appeal

A Court rule regulating the admission of attorneys is deemed to be a state statute within the meaning of 28 U.S.C. § 1257(2) if the state gives the rule the force of law. In *Lathrup* v. *Donahue,* 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d (1961), a Wisconsin State Bar rule, promulgated by the Wisconsin Supreme Court, requiring the payment of annual dues was held to be a "statute" within the meaning of 28 U.S.C. § 1257(2):

> "We think that the order is a 'statute' for the purposes of § 1257(2). Under that section, the legislative character of challenged state action, rather than the nature of the agency of the State performing the act, is decisive of the question of jurisdiction. It is not necessary that the state legislature itself should have taken the action drawn in question. In construing the similar jurisdictional provision in the Judiciary Act of 1867, 14 Stat. 385, we said: *'Any enactment,* from

> whatever source originating, *to which a State gives the force of law* is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court.' Williams v Bruffy, 96 US 176, 183, 24 L ed 716, 717. We likewise said of the provision of the Act of 1925, 43 Stat. 936, which is the present § 1257(2): '. . . the jurisdictional provision uses the words "a statute of any State" in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the State gives its sanction.' " *Id.* at 824 (emphasis added).

See also, In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed. 910 (1973).

2. The Validity of New York's Interpretation of the Rule was Drawn In Question

Appellant's application to the New York Court of Appeals expressly challenged the constitutionality of what was believed to be an anachronistic interpretation of the rules requiring that an attorney *reside* where he was admitted in order to qualify for admission. Appellant argued that the two cases interpreting the rule in this fashion had been abrogated by subsequent amendment; but if not, it was expressly contended that using residence as a criterion would be unconstitutional. It was expressly contended that residence was substantively unrelated to competency, that it was "unfairly arbitrary in relation to any regulatory purpose", See Appendix at 13a, and that residence as a criterion unconstitutionally penalized appellant's exercise of the fundamental right to move among the states. See Appendix at 13a-14a. Thus, "the ground [of invalidity was] brought to the attention of the State Court with fair precision and in due time." *Street* v. *N.Y.*, 394 U.S. 576, 584, 22 L.Ed. 572, 580, 89 S.Ct. 1354 (1968).

There is no New York statute, court rule or case law authority which requires more specificity. *Id.*

The fact, therefore, that New York applied the residency requirement to appellant's application "as against the contention that such application [was] invalid on federal grounds," *Japan Lines, Ltd.* v. *County of Los Angeles,* 414 U.S. 434, 441, 99 S.Ct. 1813, 60 L.Ed.2d 336, 343 (1979), establishes that the validity of the statute and court rule was drawn in question within the meaning of 28 U.S.C. § 1257(2).[4] The Court of Appeals decided against all appellant's arguments. *See, Cox Broadcasting Corp.* v. *Cohen,* 420 U.S. L.Ed.2d, 328, 338, 95 S.Ct. 1029 (1975). The effect of the decision was to deny the constitutional claims; hence, those claims are reviewable in this Court pursuant to 28 U.S.C. § 1257(2). *Bryant* v. *Zimmerman,* 278 U.S. 63, 67, 73 L.Ed. 184, 187, 49 S.Ct. 61, 62 A.L.R. 785 (1928).

3. There is No Adequate Non-Federal Ground to Support the Decision

No adequate independent non-federal ground exists to support the decision. Although the Court theoretically could have evaluated appellant's experience and determined that it failed to manifest sufficient competency, no attempt to analyze the nature of appellant's experience was made. No hearing was conducted; no consideration was given to appellant's prior bar examination results. No request for his academic record was made. Moreover, New York does not attempt to evaluate an attorney's experience. It is necessary only that he have the "right" to practice in the highest court where he is admitted, and that

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[4] The precise basis of the decision is not set forth, despite appellant's request for some articulation of its basis. The validity of this procedure is also challenged in this appeal, and the question should be before this Court because it was impossible to raise before this appeal.

he *reside* there. *In Re Harvey,* 309 N.Y. 46, 127 N.E.2d 801 (1955) announced that:

> "One who seeks admission to our Bar without examination because he has been a member of the Bar of another state (or the District of Columbia) must have resided continuously or substantially so in that other jurisdiction for five years. As to the five years of 'practice' in the foreign jurisdiction that means admission to the Bar with the right to practice in that jurisdiction's highest court" *Id.* at 48, 127 N.E.2d at 802.

See also *Shaikh* v. *Appellate Division,* 39 N.Y.2d 676, 385 N.Y.S.2d 514, 350 N.E.2d 902 (1976).

The denial of appellant's application, if it can be explained at all, had to be based upon the residence rule. Clearly, no other substantial or sufficient state ground explains the denial. It is:

> "well settled that if the independent ground was not a substantial or sufficient one, 'it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.' [citations omitted]. Thus in *Maguire* v. *Tyler* [citation omitted], it was contended that the judgments rested on adequate state grounds. In neither was there an opinion of the state court. The Court examined the record, found the state grounds not substantial or sufficient, and reversed the judgments on the federal question." *Williams* v. *Kaiser,* 330 U.S. 470, 478, —— S.Ct. ——, 89 L.Ed. 398, 404 (1944).

An examination of the record in this matter also reveals the absence of an adequate independent non-federal ground to support the decision.

VI. Constitutional Provisions, Statutes and Court Rules Involved

U.S. Const., Amend XVI

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. Judiciary Law, § 90(b)

b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States, or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court in the department in which such person is an actual resident at the time of such application, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law, in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

Rules of the N.Y. Court of Appeals

(a) *General.* In its discretion the Appellate Division may admit to practice without examination an applicant who:

(1) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia or has been admitted to practice as an attorney and counselor at law

or the equivalent in the highest court in another country whose jurisprudence is based upon the principles of the English Common Law; and

(2) (i) while admitted to practice as specified in paragraph (1) of this subdivision, has actually practiced for a period of at least five years:

(*a*) in its highest law court or highest court of original jurisdiction in the state or territory of the United States, in the District of Columbia or in the common law country where admitted; or

(*b*) in Federal military or civilian legal service in a position which requires admission to the bar for the appointment thereto or for the performance of the duties thereof; or

(*c*) in legal service as counsel or assistant counsel to a corporation in the state or territory of the United States, the District of Columbia or in the common law country where admitted; or

(*d*) in a combination or cumulation of service among the above categories of practice or legal service even if the government service, civilian or military, was not in a jurisdiction in which the applicant was admitted to practice, where the Court of Appeals has determined that such five years of combined or cumulative service is the equivalent of the practice required in clause (a) of this subparagraph;

(3) has had the substantial equivalent of the legal education which would have been required under section 520.3 of this Part, or its predecessor section or sections, to qualify applicant to take the New York State bar examination at the time of applicant's admission to practice in such other state, territory, district or common law country, or at the time of application for admission under this section; and

(4) is over 26 years of age. 22 N.Y.C.R.R. § 520.7(a)

VII. Statement of the Case

A description of the proceedings below, how the questions were raised and how they were passed on is described in Parts I, II, IV and V of the Jurisdictional Statement. In order to be concise, they will not be repeated at this time.

The uncontroverted facts in the record below demonstrated that appellant, a graduate of Villanova University School of Law, Class of 1974, and Associate Editor of the *Villanova Law Review,* prepared for and successfully passed the Pennsylvania Bar Examination in July of 1974. At the time, it incorporated the National Conference of Bar Examiners/Educational Testing Service Multi-State Bar Examination (hereinafter Multi-State Bar Exam). He was admitted to the Bar of the Supreme Court of Pennsylvania on November 18, 1974, having achieved a scaled score of 160 (200 is the maximum). Shortly before that, on September 1, 1974, he commenced employment as the law clerk for the Honorable Edwin D. Steel, Jr., District Court Judge for the District of Delaware. During this time, he was employed in Delaware and resided in Pennsylvania; but apparently, this experience is suffcient for purposes of the Court Rules because appellant was employed by the federal government. 22 N.Y.C.R.R. § 520.7(a)(2)(i)(d).

On September 1, 1975, appellant relocated from Pennsylvania to Arizona. He commenced employment with the Office of the Attorney General for the State of Arizona on September 15, 1975 after having prepared for and taken the July 19, 1974 Arizona Bar Examination, which also included the Multi-State Bar Exam. On December 18, 1975, petitioner was admitted to the Supreme Court of the State of Arizona after having successfully passed his second bar examination with a scaled score of 166.

Appellant continued to reside and to practice law in the State of Arizona until June 1, 1979, five years following his graduation from law school and four and one-half years following the anniversary of his initial admission to

the Pennsylvania Bar. Then, he commenced employment in New York City with Kreindler & Kreindler in order to participate in his chosen area of expertise, aviation accident litigation.[5] Since June 1, 1979, appellant's clients have been residents of numerous states and countries. The matters he has been handling arise out of instrumentalities involved in air transportation, hence, instrumentalities of interstate commerce. Almost all aviation accidents are investigated by the federal government. Appellant has participated in hearings relating to these investigations. All of appellant's cases since June 1, 1979, if filed, have been brought or are pending either in U.S. District Courts, where he has obtained admission *pro hac vice* if necessary or in Arizona or Pennsylvania state courts. *It is this experience which is apparently insufficient* by New York standards.

Following November 18, 1979, the fifth anniversary of appellant's admission to the Bar of Pennsylvania, a verified petition was submitted to the New York Court of Appeals seeking admission to the Bar of the State of New York. The application was supported by affidavits of employers, all of whom recommended his admission to the Bar, as well as certificates of the Clerk of the Supreme Courts of Arizona and Pennsylvania certifying his admission to those Courts.

The application was denied, summarily without hearing or explanation. Although no reason was given, the only cogent explanation is that the application was denied because appellant did not *reside,* in Arizona or Pennsylvania, *where he was admitted* during the last five and one half months of the five years following his initial admission.

The appeal challenges the use of this criterion for this purpose.

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[5] Appellant's undergraduate college degree is in civil engineering and he was a military pilot before law school. Employment in aviation litigation with Kreindler & Krendler is a unique opportunity for him; obviously, accepting this employment required that he relocate to New York.

VIII. The Quesitons Presented Are Substantial

This appeal presents this Court with the opportunity to consider one of the key aspects of state regulation of the practice of law, namely, admission to the Bar. There has been much criticism of the level of competence generally manifested by members of the Bar, particularly before this Court, but little attention has been paid to *how* competence is determined from state to state. This appeal concedes that a State has a right to evaluate an attorney's competence; it challenges the arbitrariness of one of the methods used. It asserts that ignoring qualitative indications of an attorney's competence and focusing upon an arbitrary factor, such as residence, is no more than a disguise of a protectionist trade barrier, and it amounts to an abrogation of the State's role in assuring professional competency. No substantive relationship between residence and competence exists; yet using residence as a factor penalizes those engaged interstate commerce who have had to move from state to state. Acquiescence to the utilization of criteria such as residence, therefore, probably fosters some of the professional mediocrity observed. Attention and analysis should be focused on this situation.

Furthermore, the second or third bar examination score attained by an attorney is of dubious importance, if the first score is known and the test is standardized. Assuming that passing a bar examination for the first time manifests some academic or intellectual capacity (over and above that manifested by successful selection among superlatively qualified individuals for entry to and graduation from an accredited law school whose standards and facilities are continually maintained and reviewed), what do multiple and repetitive successes indicate? Yet, passing a bar examination requires a substantial commitment of time and resources. In appellant's case, it would be the third time the effort is made, two too many. Can the burden imposed by the requirement to pass a successive bar examination

be fairly imposed in light of its dubious significance, particularly now that most states use the standardized objective national Multi-State Bar exam? But also, is not evaluating competency solely on this basis a charade? Does not this mechanism waste resources, provide illusory protection to the public and misfocus and distract the state from its obligation to actually evaluate the competency of those who practice law?

When one considers that this arbitrary standard is used at great cost to the individual to whom it is applied, in deprivation of federal privileges and immunities, and as a result of broaching the limitations imposed by the Constitution upon the exercise of the police power, it must be concluded that the matter is substantial.

Lastly, the questions presented by this Appeal are important because of the recent articulation by this Court of the important principle that the regulation of the profession of law is not exempt from limitations deriving from federal law. *Bates, et al.* v. *State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). The appeal presents the Court with the opportunity to clarify some of the questions relating to the relationship of the states and the federal government in this area, and to reinforce the federal and local objectives in regulation of the profession which serve a legitimate purpose.

CONCLUSION

Wherefore, it is respectfully submitted that this Court has jurisdiction of this appeal under Section 1257(2), Title 28, United States Code, probable jurisdiction should be noted, and plenary consideration of the questions presented is appropriate.

Respectfully submitted,

Lee S. Kreindler
Kreindler & Kreindler
99 Park Ave.
New York, N.Y. 10016

Certificate of Service.

FRANCIS G. FLEMING, a member of the Bar of the United States Supreme Court, whose entry of appearance in this cause is being contemporaneously filed with the Clerk of the United States Supreme Court, being first duly sworn and placed upon his oath states that forty copies of the Jurisdictional Statement addressed to the Clerk of the U.S. Supreme Court, Washington D.C. 20543 and three copies of the Jurisdictional Statement were deposited December 2, 1980 in a U.S. Post Office or mail box with first-class postage prepaid, addressed to each of the following persons:

Clerk of the Court
New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Honorable Lawrence H. Cooke
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Monticello, New York 12701

Honorable Matthew J. Jasen
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Buffalo, New York 14202

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Albany, New York 12224

FRANCIS G. FLEMING

Sworn to before me this
2 day of December, 1980

SONIA AGUIRRE
Notary Public
State of New York
No. 01A5056610
Qualified in Rockland County
Cer. Filed in New York Cty.
Commission Expires March 30, 1982

Letter dated September 4, 1980, Court of Appeals, State of New York, to Francis Gerard Fleming.

STATE OF NEW YORK
COURT OF APPEALS

(SEAL)
JOSEPH W. BELLACOSA
Clerk of the Court

Clerk's Office
Albany 12207
September 4, 1980

Mr. Francis Gerard Fleming
99 Park Avenue
New York, New York 10016

Dear Mr. Fleming:

I acknowledge receipt of your letter of August 14, 1980. Please be advised that the July 14, 1980 denial of your application for a determination regarding combined or cumulative practice of law for admission without examination included a denial of your alternative request that the Court grant relief on the basis of your previous Multi-State Bar examination scores combined with your practice experience. The Court does not issue orders or judgments of denial of applications for waiver under 22 NYCRR Part 520.

Very truly yours,

JOSEPH W. BELLACOSA
Joseph W. Bellacosa

AO'B:tab

Letter dated August 14, 1980, Kreindler & Kreindler, to Clerk of the Court of Appeals.

KREINDLER & KREINDER
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CABLE "KREINDLAIR NEW YORK"

TELEX: 14-8305

Letter dated August 14, 1980, Kreindler & Kreindler, to Clerk of the Court of Appeals.

August 14, 1980

Mr. Joseph W. Bellacosa
Clerk of the Court
New York Court of Appeals
Albany, New York 12027

Re: In the Matter of the Application of
Francis Gerard Fleming for Admission
to the Bar Without Examination

Dear Mr. Bellacosa:

On July 14, 1980, I received a letter from you indicating that my "petition" had been denied by the Court of Appeals. However, my Petition sought admission without examination on the basis of my five years experience as an attorney, *or, in the alternative,* a waiver of strict compliance regarding admission by examination based upon the fact that I have previously successfully passed two Multi-State Bar Examinations.

I am uncertain as to whether or not the Court intended to deny the entirety to my application because your letter only refers to a request for a "waiver of strict compliance with the practice requirement". Furthermore, I have not received any information or notice regarding the reason why the application was denied.

Therefore, I request reconsideration of my application, and if it is denied, I request some formal articulation of the basis of the denial and a judgment or order.

Sincerely,

FRANCIS G. FLEMING

FGF/rc

Letter dated July 14, 1980, Court of Appeals of the State of New York, to Francis Gerard Fleming.

STATE OF NEW YORK
COURT OF APPEALS

(SEAL)

JOSEPH W. BELLACOSA
Clerk of the Court

Clerk's Office
Albany 12207
July 14, 1980

Mr. Francis Gerard Fleming
99 Park Avenue
New York, New York 10016

In the Matter of the Application
of FRANCIS GERARD FLEMING
for waiver of strict compliance
with the practice requirement of
22 NYCRR 520.7(a)(2).

Dear Mr. Fleming:

I am directed by the Court of Appeals to advise you that your petition in the above captioned proceeding verified June 30, 1980, has been denied.

Very truly yours,

JOSEPH W. BELLACOSA
Joseph W. Bellacosa

AO'B:tab

Notice of Appeal.

NEW YORK COURT OF APPEALS

In the Matter of the Application
for Admission to the Bar of

FRANCIS GERARD FLEMING

To: THE NEW YORK COURT OF APPEALS

PLEASE TAKE NOTICE that Francis Gerard Fleming (hereafter appellant), hereby appeals the decision of the New York Court of Appeals denying his "Application for Determination Regarding Combined or Cumulative Practice of Law for Admission Without Examination" to the United States Supreme Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2). No formal judgment or written order has been entered and filed in this matter by the New York Court of Appeals despite appellant's written request for judgment or order; however, the decision appealed from is contained in the letter of the Clerk of the Court to appellant dated July 14, 1980 preliminarily denying appellant's application, and the letter of the Clerk of the Court to appellant dated September 4, 1980 finally denying appellant's application upon his request for clarification and reconsideration.

Dated: November 25, 1980

Respectfully submitted,

KREINDLER & KREINDLER

By: PAUL EDELMAN
Lee S. Kreindler
Paul S. Edelman

FRANCIS G. FLEMING
Francis Gerard Fleming
99 Park Avenue
New York, New York 10016

Filed: November 26, 1980

Certificate of Service.

PAUL S. EDELMAN, a member of the Bar of the United States Supreme Court, whose entry of appearance in this cause is being contemporaneously filed with the Clerk of the United States Supreme Court, being first duly sworn and placed upon his oath states that a copy of this Notice of Appeal and the attached Certificate of Service was deposited November 25, 1980 in a U.S. Post Office or mail box with first-class postage prepaid, addressed to the following persons:

Clerk of the Court
New York Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Honorable Lawrence H. Cooke
Court of Appeals Chambers
County Courthouse
Monticello, New York 12701

Honorable Matthew J. Jasen
Erie County Hall
Buffalo, New York 14202

Honorable Domenick L. Gabrielli
Court of Appeals Chambers
Bath, New York 14810

Honorable Hugh R. Jones
Court of Appeals Chambers
Oneida City Courthouse
Utica, New York 13501

Certificate of Service.

Honorable Sol Wachtler
Supreme Court Building
Mineola, New York 11501

Honorable Jacob D. Fuchsberg
50th Floor
233 Broadway
New York, New York 10007

Honorable Bernard S. Meyer
Court of Appeals Chambers
36 W. 44th Street
New York, New York 10036

Attorney General for the State of New York
Capitol Building
Albany, New York 12224

PAUL EDELMAN .
Paul S. Edelman

Sworn to before me this
25th day of November, 1980

MARIA ANGRI
Notary Public

MARIA ANGRI
Notary Public, State of New York
No. 4723373
Qualified in Kings County
Term Expires March 30, 1982

Application of Francis G. Fleming, for Determination Regarding Combined or Cumulative Practice of Law for Admission Without Examination.

NEW YORK COURT OF APPEALS

In the Matter of the Application
for Admission to the Bar of

FRANCIS GERARD FLEMING

To: NEW YORK COURT OF APPEALS

FRANCIS G. FLEMING, residing at 99 Park Avenue, New York, New York 10016, by virtue of his employment with Kreindler & Kreindler, by the authority of:

a. N.Y. Judiciary Law, §§ 90 and 460 *et seq.;*

b. The *Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law,* 22 N.Y. Codes, Rules and Regulations, Part 520; and

c. N.Y. Court Rules, New York Supreme Court, Appellate Division, First Department, Part 602

presents this application to the New York Court of Appeals in connection with his petition for admission as an attorney and counselor at law without examination, seeking this Court's determination that applicant's five years of combined or cumulative practice or legal service is the equivalent of actual practice for at least five years in the highest law court or highest court of original jurisdiction in which applicant is admitted.

In support thereof, applicant shows the Court the following:

a. Applicant, Francis G. Fleming, has been admitted to practice in the highest law court of the Commonwealth of Pennsylvania since November 18,

1974 (See Appendix 1 attached to and made a part hereof), and the highest law court of the State of Arizona since December 18, 1975 (See Appendix 2 attached to and made a part hereof); and,

b. While admitted to practice in Pennsylvania and Arizona, applicant has engaged in actual practice or legal service for a period of at least five years in a combination or cumulation of practice or legal service in the following respects:

1. From September 1, 1974 until August 31, 1975, in the federal civilian legal service in a position which requires admission to the Bar for appointment thereto or for performance of the duties thereof, namely, a federal judicial law clerk; and

2. From September 1, 1975, until the present, in actual practice or legal service the highest law court or highest court of original jurisdiction of the Commonwealth of Pennsylvania, the State of Arizona, the Courts of the United States and state and federal agencies, all as more particularly described in the attached supporting affidavits of:

The Honorable Edwin D. Steel, Senior U.S. District Court Judge for the District of Delaware;

Roderick G. McDougall, Chief Assistant Attorney General, Office of the Attorney General for the State of Arizona;

Charles D. Roush, President, Treon, Warnicke, Dann & Roush, P.A., 919 North First Street, Phoenix, Arizona; and

Applicant, Francis G. Fleming.

Application of Francis G. Fleming, for Determination Regarding Combined or Cumulative Practice of Law for Admission Without Examination.

Alternatively, pursuant to Rule 520.9 applicant requests this Court to exercise its discretion to waive strict compliance with the Rules of the Court regarding admission of attorneys without examination for the reason that it would constitute undue hardship to the applicant to require him to submit to a third bar examination in view of the scores attained by applicant in the 1974 and 1975 Multi-State Bar Examinations, and the nature of his legal experience since his initial admission to the Pennsylvania Bar on November 18, 1974 adequately manifests the requisite competence for admission as an attorney and counsellor at law.

A Memorandum of Law in Support of the Application is also submitted for the convenience of this Court.

WHEREFORE, applicant requests this Court to issue its Order determining that applicant's five years of combined or cumulative service is the equivalent of actual practice or legal service in the highest law court or highest court of original jurisdiction of the Commonwealth of Pennsylvania, a jurisdiction in which applicant has been admitted for at least five years; alternatively, applicant requests this Court to waive strict compliance with the Rules of the Court relating to the admission of attorneys without examination and to issue its order permitting applicant to be admitted without examination on the basis of his previous Multi-State Bar Examination scores and the nature of his experience since initial admission to the Pennsylvania Bar on November 18, 1974 for the reason that applicant has adequately manifested that he is professionally competent to engage in the practice of law.

Application of Francis G. Fleming, for Determination Regarding Combined or Cumulative Practice of Law for Admission Without Examination.

This 30 day of June, 1980

Respectfully submitted,

FRANCIS G. FLEMING
Francis G. Fleming

KREINDLER & KRELINDER

By: PAUL S. EDELMAN
Paul S. Edelman
Member of the Firm
99 Park Avenue
New York, N. Y. 10016

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

FRANCIS G. FLEMING, being duly sworn, deposes and says that he is the petitioner in the within application; that he has read the foregoing petition and knows the contents thereof; and that the same is true to his knowledge, except as to matters therein stated to be alleged on information and belief, and that as to the matters, he belives them to be true.

FRANCIS G. FLEMING
Francis G. Fleming

Sworn to before me this
30th day of June, 1980

CHRISTIANE CAURANT
Notary Public

CHRISTIANE CAURANT
Notary Public, State of New York
No. 41-4643422
Qualified in Queens County
Commission Expires March 30, 1981

Memorandum in Support of Application for Admission Without Examination.

NEW YORK COURT OF APPEALS

In the Matter of the Application for Admission to the Bar of

FRANCIS GERARD FLEMING

I. *Introduction*

* * * *

II. *Summary of Applicant's Background and Experiences*

* * * *

III. *Applicant's Residency Since June 1, 1979 While Practicing Law Should Not Be Relevant to Whether the Nature of His Experience Is the "Equivalent" of Actual Practice in Pennsylvania.*

* * * *

IV. *A State May Not Constitutionally Restrict An Individual From Engaging In His Chosen Profession Within Its Borders Solely On the Basis of Residence.*

As this Court has recently pointed out:

> While the precise reach of the [privilege and immunities] clause must await further clarification, it is settled that a state may not premise an individual's right to engage in his chosen occupation within its borders solely on residence." *Gordon* v. *Committee on Character and Fitness, supra* at ——, 422 N.Y.S. 2d at 644, 397 N.E.2d ——.

Memorandum in Support of Application for Admission Without Examination.

Residence as a factor in relation to bar admission has been accurately characterized as being an antiquated remnant of protectionist trade barriers of days past. Note, 56 *Cornell L.Rev.* 831 (1974). Although it is readily conceded that a State possesses a regulatory interest in protecting the public from incompetent lawyers, the means adopted must be narrowly drawn and the least restrictive alternative available. *See Hicklin* v. *Orbeck,* 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed. 2d 397 (1978).

Even if it could be colorably argued that the *Lerch* rule related to some undefined evil, it throws the baby out with the bath water and is unfairly arbitrary in relation to any regulatory purpose. Indeed, "[n]o valid reason [has ever been] proffered as to why admission to practice law before the courts of this State must be made dependent upon residency." *Gordon* v. *Committee on Character and Fitness, supra at* ——, 422 N.Y.S.2d at 646, 397 N.E.2d at ——.

The absence of a rational basis for tying residence to competence is tacitly admitted in the Court rules inasmuch as it is clear that *no* residence requirement applies to experience obtained in federal government service. 22 N.Y.C.R.R. § 520.7(a)(2)(d). How residence can be substantively relevant to a lawyer in state governmental or private practice but not a lawyer working for the federal government is unknown. Such a distinction must not have been intended, and should not be implied or assumed.

Moreover, the opportunity to relocate among the several states has been found to be a fundamental right of national citizenship, *Shapiro* v. *Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d (1966). Restrictions imposed by any state which hamper this fundamental right to interstate movement can only be sustained if they are *necessary* to effectuate a *compelling* governmental interest.

> "In moving from State to State or to the District of Columbia [a citizen is], exercising a constitutional

right, and any classification which serves to penalize the exercise of that right, unless shown to be *necessary* to promote a *compelling* governmental interest, is unconstitutional." *Id.* at 634, 89 S. Ct. .at ——, 122 L.Ed. 2d a 615. (emphasis supplied).

The applicant's legal experience discloses that his professional life has coincided with the exercise of his right to relocate among the states; from New York (his legal residence at the time of separation from military service) to Pennsylvania (his residence during law school and while a law clerk), to Arizona (where he acquired most of his legal experience) and back to the New York state metropolitan area (where he is presently employed). Clearly, that he has exercised his fundamental right to move among the states cannot be used to penalize his application for admission in the absence of a strong governmental necessity. None exists here!

In view of these constitutional limitations, disregarding any of Mr. Fleming's work experience because of his residence would arbitrarily deny him the opportunity to engage in his chosen profession in this state and impermissibly chill the exercise of the right to interstate travel. Mr. Fleming's suitability for admission without examination should be ascertained on the basis of the qualitative nature of his experience and the fact that he has already achieved exemplary scores on two previous bar examinations. If Mr. Fleming's experience would have been treated as sufficient to qualify him for admission without examination had it occurred while he resided in Pennsylvania, the application should, indeed must, be granted.

Memorandum in Support of Application for Admission Without Examination.

V. *Even If Mr. Fleming's Experience Does Not Constitute Strict Compliance With the Court Rules. It Would Cause Undue Hardship to Require Him to Pass a Third Bar Examination and Strict Compliance Should be Waived.*

* * * *

CONCLUSION

For the reasons set forth herein, this Court should find that Mr. Fleming's experience is the equivalent of five years actual practice in Pennsylvania and enter the Order requested permitting Mr. Fleming's admission without examination.

Dated: New York, New York
June 30, 1980

Respectfully submitted,

KREINDLER & KREINDLER
By: PAUL S. EDELMAN
Paul S. Edelman
A Member of the Firm
99 Park Avenue
New York, N.Y. 10016

No. 80-902

SUPREME COURT, U.S.
FILED
JAN 7 1981
CLERK

IN THE

Supreme Court of the United States

October Term, 1980

In the Matter of the Application for Admission to the New York State Bar of

FRANCIS G. FLEMING,

Appellant,

v.

NEW YORK COURT OF APPEALS,

Appellee.

On Appeal From the Court of Appeals of The State of New York

MOTION TO DISMISS

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Questions Presented

1. Does an applicant to the highest State Court for waiver of an eligibility requirement governing admission of out-of-State attorneys have a direct appeal to this Court from denial of such application, notwithstanding that he has not pursued any remedies available to him within the State court system; and is the denial of such application a "final judgment" of the highest court within the meaning of 28 USC § 1257?

2. Since the determination from which the appellant purports to appeal was issued on July 14, 1980, was he required to commence this appeal within 90 days of that date pursuant to 28 USC § 2101(c) and Rule 11.2 of this Court?

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No. 80-902

IN THE

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October Term, 1980

In the Matter of the Application for Admission to the New York State Bar of

FRANCIS G. FLEMING,

Appellant,

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NEW YORK COURT OF APPEALS,

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MOTION TO DISMISS

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State Law Involved and the Nature of the Case

Appellant seeks to bring before this Court for review the law in New York State by which attorneys admitted to practice in other jurisdictions may be admitted to practice in New York State without further examination.* Appellant notes that State laws which require residency as a condition for admission to practice have been criticized in recent years. Indeed, the New York State Court of Appeals has struck down the requirement of residency in New York (*Gordon v. Committee on Character and Fitness*, 48 NY2d 266 [1980]).** The rule involved in this case, however, does not require residency in the State of New York as a condition to admission, but rather considers actual experience in the practice of law in another jurisdiction in determining whether or not an applicant may be admitted in New York without examination.

We cannot agree, therefore, with appellant's view of the regulation he seeks to challenge. However, we submit that the challenge is not properly before this Court in any event. The application which was denied in this case requested that the Court of Appeals either certify that appellant had sufficient experience in the practice of law to justify admission without examination, or waive the rules by which such experience is ordinarily measured in the interest of justice. Such an application is not a judicial proceeding and did not give rise to an adjudicative order of the Court of Appeals. This appellant seeks authority to bring an original proceeding in the United States Supreme Court to challenge a New York State administrative regulation. Of course, no such original jurisdiction is contemplated by the United States Code or the Rules of this Court.

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*The rule in question is 22 NYCRR § 520.7 promulgated by the New York State Court of Appeals. The appellant contends, and appellee agrees, that this regulation constitutes the law of the State of New York for purposes of 28 USC § 1257. Copies of this section and section 520.10 are provided in the appendix to this brief (A-30; page references preceded by the letter "A" are to the appendix).

**It should be noted that State judicial review was sought and granted in that case after final denial of admission by the Appellate Division of New York Supreme Court (see p , below; see also *Jensen v Murphy*, USDC Maryland, 11/13/80; US Law Week 49 LW 2338, 11/25/80.

On the other hand, appellant has no less than three lawful avenues open to him by which to obtain judicial review in the State courts and make the contention he seeks to present herein: a proceeding pursuant to New York Civil Practice Law and Rules (CPLR), Art 78; a declaratory judgment action pursuant to CPLR, § 3001 wherein he could most appropriately challenge the constitutionality of the regulation; and an application for admission to practice made to the Appellate Division of New York State Supreme Court pursuant to New York Judiciary Law, § 90, from which an appeal could be taken to the Court of Appeals. No judicial review of appellee's administrative determination has been sought by the appellant under State court procedures available to him. This "appeal" is therefore decidedly premature.

Moreover, the application denied in this case was made June 30, 1980 (A-5) and denied July 14, 1980 (A-4). An appeal to this Court must be commenced by the filing of a notice of appeal within 90 days after the denial (October 13, 1980). Appellant contends only that the notice of appeal in this case was filed November 26, 1980; thus he appears to assume without arguing that by writing on August 14, 1980 (appellant's appendix p 3a) to the Clerk of the Court of Appeals, he was able to extend the period in which an appeal must be taken. Apparently, appellant would measure the 90-day period from the date the Clerk of the Court of Appeals replied to his letter, September 4, 1980 (appellant's appendix p 1a). This exchange of correspondence did not amount to an application for reconsideration of the original denial (U.S. Supreme Court, Rule 11.3) and therefore did not extend the limitation of time otherwise applicable. This "appeal" has not been timely commenced.

Facts

The appellant is an attorney admitted to practice in Pennsylvania and Arizona who seeks admission to practice in New York State. There appears to be no dispute that appellant is free to apply for such admission after taking and passing the New York State Bar Examination. 22 NYCRR § 520.7, however, authorizes the admission without examination of attorneys who are admitted in

another qualifying jurisdiction and have continuously and actually practiced law in such jurisdiction for a period of five years or more.

This regulation was promulgated by the New York State Court of Appeals. In addition to its judicial functions (New York Constitution, Art VI, § 3), the Legislature has delegated to the Court of Appeals (NY Judiciary Law, § 53) the authority to promulgate regulations concerning admission to practice law in the State of New York. Under the regulations so promulgated and Judiciary Law § 90, the function of reviewing and admitting candidates is performed primarily by the New York State Board of Law Examiners and the Appellate Divisions of the New York Supreme Court, which are the intermediate appellate courts. Two functions are retained by the Court of Appeals, the highest court, under these regulations. Under 22 NYCRR § 520.10 the Court of Appeals may "vary the application of or waive any provision of these rules where strict compliance will cause undue hardship on the applicant." Under 22 NYCRR § 520.7 (2[d]) the Court of Appeals may certify that a combination of experience satisfies the requirement of five years of experience for admission without examination.

It should be noted that the application for admission to the bar is made to, and admission is conferred by, an Appellate Division (New York Judiciary Law § 90). The power of the Court of Appeals is only to certify that certain of the standards for admission have been met. Thus the Court of Appeals (appellee) was without power to admit this applicant. There is no indication on the record that he has in fact applied for admission to practice, much less that such an application has been denied.

Appellant applied under 22 NYCRR 520.7 and 520.10 for waiver of the requirement to take the New York State Bar Examination (A-5). The application was denied (A-4).

ARGUMENT

The Determination from which this appeal is taken was not the final judicial determination of the New York State Court of Appeals and is, therefore, premature. Furthermore, this appeal was not taken within 90 days after the determination complained of, as required by 28 USC 2101.

By attempting to appeal directly to this Court from an administrative ruling, apellant has not only neglected legal remedies available to him in State court, he has also deprived appellee and this Court of a meaningful record on which to base consideration of the case. The appendix to apellant's jurisdictional statement consists of a collection of documents, legal argument, and correspondence, which apparently is not held out as the record on appeal. Appellee, of course, objects to the inclusion, among documents this Court is requested to consider, of purported excerpts from a memorandum of law (Jurisdictional Statement 12a-15a) and correspondence between appellant and the office of the Clerk of the New York Court of Appeals (1a-3a).*

This "record" accurately reflects the failure of appellant to pursue his available judicial remedies in the State courts. It is, thus, appropriate that 28 USC 1257 applies in this case. From the first sentence of that section it is plain that Congress did not contemplate that this Court would take jurisdiction over State court matters which had not run the gamut of the State judicial process: a process which, in the present case, has not even begun. As we have indicated, New York State law permits this appellant to seek judicial review of the determination to which he objects; it also permits him to complete his application for admission and, if denied, seek judicial review in the Court of Appeals.

A. **The denial from which this appeal is taken is not the final judgment of the highest Court in New York State, as required by 28 USC 1257.**

---

*Appellant also omits from his appendix affidavits he submitted in support of his application, and which would presumably be a part of the record if appeal were to be permitted. Appended hereto are copies of all papers received and considered by the Court of Appeals in this matter.

The New York Civil Practice Law and Rules (Art 78) provides for judicial review of determination made by any governmental body or officer. A "body or officer" (CPLR § 7802[a]) "includes every court, tribunal, board, corporation, officer * * *". While there is some early authority in New York that the admission of attorneys is a judicial function (In *re Cooper*, 22 NY 67 [1860]), it clearly does not affect the present application, which does not seek admission to practice. Rather, it seeks waiver of certain rules of the Court of Appeals governing admission to practice, as they may apply if and when this applicant applies for admission. The Court was acting here in its administrative rather than its judicial capacity.

New York State Constitution, Art VI (§§ 2-3) continues the Court of Appeals as the highest judicial Court in the State. It is comprised of seven judges of whom five constitute a quorum. Four judges must concur in any result. In contrast, the function performed by the Court of Appeals in the present case is delegated to it by the Legislature (New York Judiciary Law, § 53), rather than the Constitution. The purported decision in this case was simply a letter from the clerk of the Court advising appellant that his application had been denied.

That the Court of Appeals performs both judicial and administrative functions in New York is well established. New York State Constitution Art VI § 28, and Judiciary Law Art 7-A give the chief judge and the Court a substantial role in the administration of the State court system. Civil Practice Law and Rules, § 1026 recognizes that this administrative role may give rise to litigation in the inferior courts, for it provides that the party to be named in such cases is the Chief Administrator of the Courts, rather than the Court of Appeals or any of its judges.

Thus the limitation on this Court's jurisdiction imposed by the first sentence of 28 USC 1257 dictates that this matter is not yet ripe for review by this Court. The legal question sought to be presented by the appellant has not yet been passed on by any New York Court, much less the highest Court of the State. A review of his application (A-5) shows that the constitutionality of the rule in question, which he purports to raise in this Court, was not even raised in the State

Court. There, he sought not a review of the validity of the rules applicable to his admission, but rather a review of his own qualifications in relation to those rules.

Not only is judicial review available and appropriate under Civil Practice Law and Rules, Article 78, which provides for challenges to administrative action, but also, to the extent that appellant presents a challenge to the validity of State statute or regulation, an action for declaratory judgment is available under CPLR § 3001. There can be doubt that the full measure of relief sought is avaiable in a declaratory judgment action (CPLR § 3017[b]). By either of these two means (or possiby even a combination of them; *Altona Citizens Committee v. Town of Altona,* 77 AD2d 956, [3d Dept, 1980]) a full judicial hearing and proper appellate record and review would be made available to appellant and this Court.

Nor would it be futile for this appellant to seek judicial review in New York of the rules governing admission to practice. New York Courts, including appellee, have been responsive to developments in the application of State and Federal constitutional requirements to the regulation of the practice of law. As noted above, the New York Court of Appeals recently struck down a residency requirement for admission to the Bar (*Matter of Gordon, supra;* see also, *Matter of Lofsof,* 34 NY2d 952 [1974]; *Matter of Pirie,* 64 AD2d 110 [1st Dept, 1978]).

These cases are especially noteworthy for the legal context in which they were considered. In each case, the applicants, instead of seeking to bypass State admission procedures, went forward with their applications for admission. The granting or denial of admission on the basis of the admission standards to which they objected gave rise to an actual judicial evaluation of the applications and the law governing them. Had they found it necessary to invoke the jurisdiction of this Court, those applicants would have had no difficulty in showing that the State Court decision on review was the final judicial one (rather than a preliminary administrative determination) (see also, 28 USC 1257 [1]; *Hanson v. Denckla,* 337 US 235, 244.)

B. **This appeal is barred by the time limitations of 28 USC 2101.**

It is axiomatic that a party cannot revive the time in which to seek review by his own self-serving reapplication to the lower tribunal (see, e.g., *FTC v. Minneapolis-Honeywell Co.*, 344 US 206, 210-11 [1952]). To the extent that there has been any final determination of appellant's rights, it occurred on July 14, 1980 (A-5). Appellant's letter requesting clarification (Jurisdictional Statement, p la) did succeed in provoking an answering letter from the Clerk of the Court (3a) but the Clerk restated the original determination. There is no provision or principle of New York law which would entitle appellant to reconsideration of the original determination. He was not entitled to and did not revive his petition on August 14, 1980. The last paragraph of his letter of that date (3a) is clearly aimed at Rule 11.3 of this Court (which extends the time in which to appeal) rather than to any legitimate expectation of rehearing.

The 90 days within which appellant could appeal expired October 13, 1980. Any doubt in this regard arises not from any lack of finality in appellee's action, but from the appellant's choice to treat as a judicial order what was in fact a less formal administrative determination.*

It should be noted that the effect of applying this time limitation is procedural only and does not deprive the appellant of the opportunity to press his legal claim, should he be so advised. As noted above, the conventional procedure of applying to the Appellate Division for admission apparently is still open to him (even if Article 78 review of the present determination is barred by the applicable four month statute of limitations). That Court may choose to admit him, and if not, the Court of Appeals may reverse or modify the order of the Appellate Division. At both levels, appellant would have the opportunity to present the arguments he seeks to present here; and the courts of New York would have the opportunity to consider them. Appeal to this Court would then be available in the unlikely event that the constitutional rights of the applicant are flouted by the New York courts.

---

*Appellee herein argues that the determination was non-judicial, but not non-final.

CONCLUSION

The Purported Appeal should be dismissed.

Dated: Albany, New York
January, 1981

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellee

SHIRLEY ADELSON SIEGEL
Solicitor General

FRANKLIN K. BRESELOR
Assistant Attorney General

Of Counsel

APPENDIX

NEW YORK COURT OF APPEALS

----------x

In the Matter of the Application
for Admission to the Bar of
FRANCIS GERARD FLEMING

NOTICE OF APPEAL

----------x

TO: THE NEW YORK COURT OF APPEALS

PLEASE TAKE NOTICE that Francis Gerard Fleming, (hereafter appellant) hereby appeals the decision of the New York Court of Appeals denying his "Application for Determination Regarding Combined or Cumulative Practice of Law for Admission Without Examination" to the United States Supreme Court.

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Dated: November 25, 1980

Respectfully submitted,

KREINDLER & KREINDLER

By: _____
LEE S. KREINDLER
PAUL S. EDELMAN

_____
FRANCIS GERARD FLEMING
99 Park Avenue
New York, New York

CERTIFICATE OF SERVICE

PAUL S. EDELMAN, a member of the Bar of the United States Supreme Court, whose entry of appearance in this cause is being contemporaneously filed with the Clerk of the United States Supreme Court, being first duly sworn and placed upon his oath states that a copy of this Notice of Appeal and the attached Certificate or Service was deposited November 25, 1980 in a U.S. Post Office or mail box with first-class postage prepaid, addressed to the following persons:

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Erie County Hall
Buffalo, New York 14202

Honorable Domenick L. Gabrielli
Court of Appeals Chambers
Bath, New York 14810

Honorable Hugh R. Jones
Court of Appeals Chambers
Oneida City Courthouse
Utica, New York 13501

Honorable Sol Wachtler
Supreme Court Building
Mineola, New York 11501

Honorable Jacob D. Fuchsberg
50th Floor
233 Broadway
New York, New York 10007

Honorable Bernard S. Meyer
Court of Appeals Chambers
36 W. 44th Street
New York, New York 10036

Attorney General for the State of New York
Capitol Building
Albany, New York 12224

Paul S. Edelman

Sworn to before me this
25th day of November, 1980

Notary Public

MARIA ANGRI
Public, State of New York
No. 4723973
Qualified in Kings County
Term Expires March 30, 1982

State of New York, to Francis Gerard Fleming.

STATE OF NEW YORK
COURT OF APPEALS

(Seal)

Joseph W. Bellacosa
Clerk of the Court

Clerk's Office
Albany 12207
July 14, 1980

Mr. Francis Gerard Fleming
99 Park Avenue
New York, New York 10016

In the Matter of the Application
of FRANCIS GERARD FLEMING
for waiver of strict compliance
with the practice requirement of
22 NYCRR 520.7(a)(2).

Dear Mr. Fleming:

I am directed by the Court of Appeals to advise you that your petition in the above captioned proceeding verified June 30, 1980, has been denied.

Very truly yours,

JOSEPH W. BELLACOSA
Joseph W. Bellacosa

AO'B:tab

(Retyped for clarity of reproduction)

NEW YORK COURT OF APPEALS

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In the Matter of the Application for Admission to the Bar of

FRANCIS GERARD FLEMING

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APPLICATION FOR DETERMINATION REGARDING COMBINED OR CUMULATIVE PRACTICE OF LAW FOR ADMISSION WITHOUT EXAMINATION

TO: NEW YORK COURT OF APPEALS

FRANCIS G. FLEMING, residing at 99 Park Avenue, New York, New York 10016, by virtue of his employment with Kreindler & Kreindler, by the authority of:

a. N.Y. Judiciary Law, §§ 90 and 460 et seq.;

b. The Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, 22 N.Y. Codes, Rules and Regulations, Part 520; and

c. N.Y. Court Rules, New York Supreme Court, Appellate Division, First Department, Part 602

presents this application to the New York Court of Appeals in connection with his petition for admission as an attorney and counselor at law without examination, seeking this Court's determination that applicant's five years of combined or cumulative practice or legal service is the equivalent of actual practice for at least five years in the highest law court or highest court of original jurisdiction in which applicant is admitted.

In support thereof, applicant shows the Court the following:

or cumulative service is the equivalent of actual practice or legal service in the highest law court or highest court of original jurisdiction of the Commonwealth of Pennsylvania,

a. Applicant, Francis G. Fleming, has been admitted to practice in the highest law court of the Commonwealth of Pennsylvania since November 18, 1974 (See Appendix 1 attached to and made a part hereof), and the highest law court of the State of Arizona since December 18, 1975 (See Appendix 2 attached to and made a part hereof); and,

b. While admitted to practice in Pennsylvania and Arizona, applicant has engaged in actual practice or legal service for a period of at least five years in a combination or cumulation of practice or legal service in the following respects:

1. From September 1, 1974 until August 31, 1975, in the federal civilian legal service in a position which requires admission to the Bar for appointment thereto or for performance of the duties thereof, namely, a federal judicial law clerk ; and

2. From September 1, 1975, until the present, in actual practice or legal service the highest law court or highest court of original jurisdiction of the Commonwealth of Pennsylvania, the State of Arizona, the Courts of the United States and state and federal agencies, all as more particularly described in the attached supporting affidavits of:

The Honorable Edwin D. Steel, Senior U.S. District Court Judge for the District of Delaware;

Roderick C. McDougall, Chief Assistant Attorney General, Office of the Attorney General for the State of Arizona;

Charles D. Roush, President, Treon, Warnicke, Dann & Roush, P.A., 919 North First Street, Phoenix, Arizona; and

Applicant, Francis G. Fleming.

Alternatively, pursuant to Rule 520.9 applicant requests this Court to exercise its discretion to waive strict compliance with the Rules of the Court regarding admission of attorneys without examination for the reason that it would constitute undue hardship to the applicant to require him to submit to a third bar examination in view of the scores attained by applicant in the 1974 and 1975 Multi-State Bar Examinations, and the nature of his legal experience since his initial admission to the Pennsylvania Bar on November 18, 1974 adequately manifests the requisite competence for admission as an attorney and counsellor at law.

A Memorandum of Law in Support of the Application is also submitted for the convenience of this Court.

WHEREFORE, applicant requests this Court to issue its Order determining that applicant's five years of combined a jurisdiction in which applicant has been admitted for at least five years; alternatively, applicant requests this Court to waive strict compliance with the Rules of the Court relating to the admission of attorneys without examination and to issue its order permitting applicant to be admitted without examination on the basis of his previous Multi-

State Bar Examination scores and the nature of his experience since initial admission to the Pennsylvania Bar on November 18, 1974 for the reason that applicant has adequately manifested that he is professionally competent to engage in the practice of law.

This 30 day of June, 1980

Respectfully submitted,

Francis G. Fleming

KREINDLER & KREINDLER

By: Paul S. Edelman
Member of the Firm
99 Park Avenue
New York, N.Y. 10016

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

FRANCIS G. FLEMING, being duly sworn, deposes and says that he is the petitioner in the within application; that he has read the foregoing petition and knows the contents thereof; and that the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and that as to the matters, he believes them to be true.

FRANCIS G. FLEMING

Sworn to before me this
30th day of June, 1980

Notary Public

CHRISTIANE CAURANT
Notary Public, State of New York
No. 41-4643422
Qualified in Queens County
Commission Expires March 30, 1981

NEW YORK COURT OF APPEALS
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In the Matter of the Application for Admission to the Bar of

FRANCIS GERARD FLEMING

AFFIDAVIT OF APPLICANT DESCRIBING FIVE YEARS OF ACTUAL PRACTICE OR LEGAL SERVICE

----------x

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

Francis Gerard Fleming, being first duly sworn states and deposes that:

Affiant is the applicant in the above captioned matter.

I was born in New York State on March 15, 1945; I attended elementary school in New York City and a graduated from Xaverian High School, 7100 Shore Road, Brooklyn, New York. In 1962, I commenced college education at Villanova University, Villanova, Pa., and received a Bachelor of Engineering degree in 1967. Following college, I accepted a commission as a Second Lieutenant in the U.S. Marine Corps Reserve in 1967, and was designated a Naval Aviator in 1968. Following service in the Republic of Viet Nam during 1969 and separation from active duty as a Captain in the U.S. Marine Corps Reserve in September of 1971, I graduated from Villanova University School of Law in 1974 and was awarded the Juris Doctor Degree. During law school, I was an Associate Editor for the Villanova Law Review.

Upon completing law school in May of 1974, I applied for and took the bar examination for admission to the Bar of the Supreme Court of the Commonwealth of Pennsylvania. On November 18, 1974, I was duly admitted to the Bar of the Supreme Court of the Commonwealth of Pennsylvania on the basis of having successfully passed the Pennsylvania

Bar Examination, (see Appendix 1 attached to and made a part hereof) including the 1974 MultiState Bar Examination with a scaled score of 160 (see Appendix 3 attached to amd made apart hereof).

Commencing September 1, 1974, I accepted an appointment as the Judicial Law Clerk of the Honorable Edwin D. Steel, Jr., Senior U.S. District Court Judge for the District of Delaware, a position in Federal legal service which requires admission to the Bar for the appointment thereto or for the performance of the duties thereof as set forth in the affidavit of the Honorable Edwin D. Steel, Jr., Senior U.S. District Court Judge, submitted in support of my application.

Upon the completion of the term of the appointment as the Judicial Law Clerk for Judge Steel on August 31, 1975, I moved to the State of Arizona and commenced employment on or about September 15, 1975, initially as a lawclerk, with the Office of the Attorney General for the State of Arizona in a position which required admission to the Bar, by virtue of my membership in the Pennsylvania Bar, pending publication of the results of the July, 1975 Arizona Bar Examination. Thereafter, on December 18, 1975, I was admitted as a member of the Arizona Bar, (see Appendix 2 attached to and made part hereof) having successfully passed the Multi-State Examination for the second time with a scaled score of 166 (see Appendix 4 attached to and made a part hereof). I actually practiced law in the highest law court or highest court of original jurisdiction in the State of Arizona as an Assistant Attorney General up to and including January 17, 1977, as set forth in the Affidavit of

Roderick G. McDougall submitted in support of my application.

Commencing January 17, 1977, I accepted employment as an Associate Attorney with the law firm Treon, Warnicke, Dann & Roush, P.A., 919 North First Street, Phoenix, Arizona 85004. Between January 17, 1977 and May 31, 1979, I actually practiced law in the highest law court or the highest court of original jurisdiction in the State of Arizona, as set forth in the affidavit of Charles D. Roush submitted in support of my application. Briefly described, I actively prepared and litigated three jury trials of at least one week duration, two trials to a trial judge, five appellate matters and numerous motions and shorter judicial appearances during this period. See e.g. Guadalupe Organization et al v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022 (9th Cir. 1978); Arden Mayfair, Inc v. Ariz. Dept. of Liquor Licenses and Control, 599 P.2d 793 (Ariz. 1979); Combs et al v. Lufkin et al, 598 P.2d 1028 (Ariz. App. 1979).

Commencing June 1, 1979 I accepted employment with the law firm of Kreindler & Kreindler, 99 Park Avenue, New York, New York 10016 as an Associate Attorney. Between June 1, 1979 and the date of submission of this application, I have continued to engage in the actual practice of law in the Courts of the State of Arizona, and in numerous other courts throughout this county by virtue of my admission to the Bars of the State of Arizona and Commonwealth of Pennsylvania. Although my principal offices are located in New York, I have never engaged in the unathorized practice of law in New York State. As an attorney with Kreindler & Kreindler, I have most actively engaged in the litigation

of aircraft accidents involving major U.S. Air Carriers, general aviation aircraft and U.S. Armed Forces military aircraft on a nationwide basis, primarily, in the U.S. District Courts where I have been admitted pro haec vice by virtue of my membership in the Arizona and Pennsylvania Bars.

Specifically, since June 1, 1979, I have been actively engaged on behalf of Kreindler & Kreindler in the preparation of the following cases for trial, none of which are filed in the Courts of the State of New York.

CASE NAME	CASE NUMBER	COURT
Arthur Singer, vs. Grumman Corp. and Grumman Aerospace Corp.	Civil Action #79-C-93	U.S. District Court for the Eastern District of New York
Ilgenfritz vs. Grumman Corp. and Grumman Areospace Corp.	Civil Action #79-C-94	U.S. District Court for the Eastern District of New York
Beamer vs. Grumman Corp. and Grumman Aerospace	Civil Action #79-C-95	U.S. District Court for the Eastern District of New York
Davis vs. Grumman Corp. and Grumman Aerospace Corp.	Civil Action #79-C-96	U.S. District Court for the Eastern District of New York
Calarie vs. United States of America	Civil Action #79-0357-L	U.S. District Court for the Western District of Kentucky
Bigony v. Wright	Civil, Trespass 80-01766	Court of Common Pleas, Montgomery County, State of Pennsylvania
In re: Chicago Air Disaster	MDL # 391	U.S. District Court for the Northern District of Illinois

Of these matters, I have been admitted pro haec vice in the federal courts; and I am admitted in Pennsylvania

and have appeared in Bigony v. Wright on that basis. Although the following is not exhaustive, I have made appearances in these cases as listed:

CASES	CASE NUMBER	DATE	APPEARANCE
Singer vs. Ilgenfritz vs. Davis vs. Beamer vs. Grumman	Civil Action 79-93-C, 79-94-C, 79-95-C 79-96-C,	June 29, 1979	Pre-trial Conference before Judge Thomas C. Platt
Singer vs. Grumman	Civil Action 79-93-C	August 21, 1979	Deposition of Morton Shainess
Davis vs. Grumman	Civil Action 79-96-C	August 22, 1979	Deposition of Brenda McMann Davis
Ilgenfritz vs. Grumman	Civil Action 79-94-C	August 23, 1979	Deposition of Cheryl Ilgenfritz
Beamer vs. Grumman	Civil Action 79-95-C	August 24, 1979	Deposition of Karen Ann Ford
Singer vs. Ilgenfritz vs. Davis vs. Beamer vs. Grumman	Civil Action 79-93-C, 79-94-C, 79-95-C 79-96-C,	August 29, 1979	Appearance at offices of Mendes & Mount* 3 Park Avenue New York, N.Y.
Singer vs. Ilgenfritz vs. Davis vs. Beamer vs. Grumman	Civil Action 79-93-C, 79-94-C, 79-95-C 79-96-C	August 31, 1979	Appearance at Mendes & Mount* 3 Park Avenue New York, N.Y.
Singer vs. Ilgenfritz vs. Davis vs. Beamer vs. Grumman	Civil Action 79-93-C, 79-94-C, 79-95-C 79-96-C	Sept. 25, 1979	Appearance at th U.S. Naval Air Systems Command, Arlington, Va.
Singer vs. Ilgenfritz vs. Davis vs. Beamer vs. Grumman	Civil Action 79-93-C, 79-94-C, 79-95-C 79-96-C	Sept. 28, 1979	Pre-trial Conference before Judge Thomas C. Platt
Singer vs. Ilgenfritz vs. Davis vs. Beamer vs. Grumman	Civil Action 79-93-C, 79-94-C, 79-95-C 79-96-C	October 12, 1979	Pre-trial Confrence - before Magistrate Caden

In re Chicago Air Crash Disaster of May 25, 1979	Multi-District Litigation's Panel : 391	March 1, 1980	Plaintiffs' Counsel Committee Pre-Trial Conference, Chicago, Ill.
Calarie v. U.S.	Civil Action 79-0356-L	March 10, 1980	U.S. Dept. of Justice, Production of Documents Washington, D.C.
In re Chicago Air Crash Disaster of May 25, 1979	M.D.L.-#391	March 20, 1980	Pre-trial Conference Chicago, Ill.

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* Regarding production of doucments.

In re Chicago Air Crash Disaster of Ill. May 25, 1979	M.D.L.-#391	April 17, 1980	Pre-trial Conference Chicago,

Additionally, I have spent hundreds of hours on these cases reviewing documents in preparation for the anticipated depositions of the defendants' engineering expert witnesses.

As a result of this intensive preparation, the Grumman cases were recently settled for sums which collectively amount to $1,450,000.00; therefore, they will not be tried. Nevertheless, it is respectfully submitted that these legal services are the equivalent of actual practice in the highest law court or highest court of original jurisduction of the Commonwealth of Pennsylvania, where I have been admitted since November 18, 1974, and the State of Arizona.

Additionally, I have been involved in the prepara-

tion of and the negotiation of several other aviation matters for Kreindler & Kreindler relating to claims which have not as yet been brought to suit. In this capacity, I have attended formal administrative proceedings conducted by the federal agency responsible for investigating aircraft accidents, the National Transportation Safety Board, (N.T.S.B.) in Chicago, Illinois (regarding the McDonald Douglas DC-10 American Airlines crash) and in Cambridge, Massachusetts (regarding the Air New England and Downeast Airlines crashes) on behalf of our clients. I have also participated in the independent review and analysis of numerous evidentiary issues raised at these N.T.S.B. hearings; and, I have prepared claims arising from two other airplane crashes which occured recently near La Guardia Airport (on June 18, 1979 and August 9, 1979 respectively) with respect to legal questions of liability and damages for the purpose of presenting and pursuing claims for damages on behalf of occupants' survivors. Thus, I have also been practicing law in a manner equivalent to actual practice in the Commonwealth of Pennsylvania during the last several months by preparing aviation accidents claims for possible settlement without initiating a lawsuit.

Furthermore, since June 1979, although located in New York, I have continued to practice law actively in Arizona. I have formed and maintain a professional corporation within the State of Arizona, and I continue to represent Arizona residents in litigation pending in the Arizona Court of Appeals, Division I, the Maricopa County Superior Court, the U.S. Court of Claims, and in other respects. For example, I am the attorney of record in:

CASE NAME	CASE NUMBER	COURT
Kinzley vs. United States of America,	Petition #503-79C	United States Court of Claims
Northeast Phoenix Homeowners' Association, et al. vs. Scottsdale Municipal Airport et al.	1CA CIV 4686	Arizona Court of Appeals, Division 1

Moreover, I have been involved in the day to day prosecution of these matters.

I have recently filed a Reply Brief in the appeal Northeast Phoenix Homeowners' Association, et al v. City of Scottsdale, 1 CA-CIV. 4686 (July 31, 1979), and I recently filed a petition in the U.S. Court of Claims initiating an action for breach of contract against the United States. I have also responded to a motion to stay the proceedings in the Court of Claims matter and will continue to prepare this case and eventually try it. I have also instituted an action to Probate a will in Maricopa County Superior Court, Phoenix, Arizona and prepared and initiated an administrative application for Workmen's Compensation benefits in Arizona.

In summary, while admitted to the Bar of the Commonweath of Pennsylvania for at least five years, I believe that I have been actively engaged in the practice of law, although not entirely before Pennsylvania Courts, in a combination or cumulation of practice or legal service in the Federal civilian legal service as a federal judicial lawclerk, and in the Arizona, Pennsylvania and federal courts and agencies as an Assistant Attorney General for the State of Arizona, and as an attorney in a private practice employed by two distinguished law firms and individually. I submit that this practice or legal service is the equivalent of five years of actual practice in the highest law court or

highest court of original jurisdiction of the Commonwealth of Pennsylvania and request this Court's formal determination to that effect.

Francis G. Fleming

Sworn to before me this
day of 20th of June, 1980

Sonia Aguirre
Notary Public

SONIA AGUIRRE
Notary Public, State of New York
No. 01A4956610
Qualified in Rockland County
Cer. Filed in New York Cty.
Commission Expires Mar. 30, 1982

NEW YORK COURT OF APPEALS
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In the Matter of the Application for Admission to the Bar of

FRANCIS GERARD FLEMING

AFFIDAVIT OF FEDERAL LEGAL SERVICE SEPT., 1974 - Aug., 1975

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STATE OF DELAWARE)
) ss.:
COUNTY OF NEW CASTLE)

Edwin D. Steel, Jr., being duly first sworn deposes and says that:

Affiant is a Senior United States District Court Judge, United States District Court for the District of Delaware.

During the period September 1, 1974 through August 31, 1975, following graduation from law school, applicant, Francis G. Fleming, was employed in the capacity of my judicial law clerk.

The position of U.S. District Court judicial law-clerk requires admission to the Bar for the performance of its duties, and applicant, Francis G. Fleming, was admitted to the Bar of the Supreme Court of the Commonwealth of Pennsylvania on November 18, 1974.

Affiant recommends applicant, Francis G. Fleming, to the New York Court of Appeals and New York Supreme Court, Appellate Division, First Judicial Department, for admission to the practice of law as an Attorney and Counselor and member of the Bar of the New York State.

Edwin D. Steel, Jr.

Sworn to before me this 27th day of May, 1981

Notary Public

NEW YORK COURT OF APPEALS
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In the Matter of the Application
for Admission to the Bar of
FRANCIS GERARD FLEMING

AFFIDAVIT OF STATE LEGAL SERVICE AND ACTUAL PRACTICE SEPT., 1975-JAN., 1977

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STATE OF Arizona)
)ss.:
COUNTY OF Maricopa)

Roderick G. McDougall, being duly first sworn deposes and says that:

Affiant is the Chief Assistant Attorney General, Office of the Attorney General for the State of Arizona.

On or about September 15, 1975, applicant, Francis G. Fleming, commenced employment in the Office of the Attorney General for the State of Arizona as a lawclerk until December 18, 1975 by virtue of his admission to the Bar of the Supreme Court of Pennsylvania.

On December 18, 1975, applicant, Francis G. Fleming was admitted to the Bar of the Supreme Court of the State of Arizona, and actually practiced law as an Assistant Attorney General for the Office of the Attorney General for the State of Arizona in the highest law court or highest court of original jurisdiction in the State of Arizona until January 15, 1977.

Between September 15, 1975 and January 15, 1977, applicant, Francis G. Fleming participated in numerous judicial and administrative proceedings on behalf of the State of Arizona, including matters in the Supreme Court of the State of Arizona, the U.S. Court of Appeals for the Ninth Circuit, and the Maricopa County Superior Court; this

participation included writing appellate briefs, preparing for and responding to motions in court and trial of summary proceedings; applicant, Francis G. Fleming also acted as an attorney on behalf of more than 15 Executive Agencies of the State of Arizona in administrative proceedings and at formal meetings.

Additionally, between September 15, 1975 and January 15, 1977, applicant, Francis G. Fleming actively engaged in the discovery phases of numerous other litigation matters, including participating in the preparation and answering of interrogatories and requests for the production of documents, interviewing and preparing witnesses, taking and attending depositions; additionally applicant engaged in intensive legal research and writing leading to the issuance of formal legal opinions of the Office of the Attorney General for State of Arizona and he engaged in the review and negotiation of contracts involving the State of Arizona.

Affiant recommends applicant, Francis G. Fleming, to the New York Court of Appeals and the New York Supreme Court, Appellate Division, First Judicial Department for admission to the practice of law as an Attorney and Counselor and member of the Bar of New York State.

Roderick G. McDougall

Sworn to before me this
24th day of January, 1980.

Notary Public

My Commission Expires May 4, 1983

NEW YORK COURT OF APPEALS

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In the Matter of the Application for Admission to the Bar of

FRANCIS GERARD FLEMING

AFFIDAVIT OF ACTUAL PRACTICE JAN., 1977-JUNE, 1979

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STATE OF ARIZONA)
) ss.:
COUNTY OF MARICOPA)

Charles D. Roush, being duly first sworn deposes and says that:

Affiant is President of the law firm Treon, Warnicke, Dann & Roush, P.A., 919 North First Street, Phoenix, Arizona.

On January 17, 1977, applicant Francis G. Fleming, commenced employment with the law firm Treon, Warnicke, Dann & Roush, P.A. as an Associate Attorney and actually practiced law with this law firm as a member of the Bar of the Supreme Court of Arizona in the highest law court or highest court of original jurisdiction of the State of Arizona from January 17, 1977 to May 31, 1979.

From January 17, 1977 to May 31, 1979, applicant, Francis G. Fleming, participated in numerous judicial and administrative proceedings as an attorney of this firm in the Supreme Court of the State of Arizona, the Arizona

Court of Appeals, the U.S. Court of Appeals for the Fourth Circuit, the Maricopa County Superior Court, the Pinal County Superior Court, the U.S. District Court for the District of Arizona, the Arizona State Liquor Board, the City Council of the City of Phoenix and the City Council of the City of Scottsdale.

As an Associate Attorney with this firm, applicant, Francis G. Fleming, conducted the examination of witnesses and participated in the argument of the law and facts in the trial of at least five major cases; applicant also wrote Appellate Briefs and appeared in the Appellate Courts of this state for oral argument in at least three appellate matters and he contributed significantly to the Appellate Brief in at least one appellate matter in the U.S. Court of Appeals for the Fourth Circuit.

In addition to the actual participation in the trial and appeal of matters in which this firm has been involved, applicant, Francis G. Fleming extensively engaged in the discovery phases of numerous other matters, including participating in the preparation of and answering of interrogatories and requests for the production of documents, interviewing and preparing witnesses, and taking and attending depositions; applicant has also participated in other types of court proceedings, including motions and summary proceedings; applicant has also been actively engaged in the successful negotiation and settlement of matters which were amicably resolved by agreement.

Affiant recommends applicant, Francis G. Fleming, to the New York Court of Appeals and the New York Supreme

Court, Appellate Division, First Judicial Department for Admission to the practice of law as an Attorney or Counselor and member of the Bar of New York State.

Charles D. Roush

Sworn to before me this
21st day of January, 1980.

Notary Public

My Commission Expires:
January 18, 1984.

Supreme Court of Pennsylvania

know all men by these presents,

That FRANCIS GERARD FLEMING

was duly admitted to the Bar of the Commonwealth of Pennsylvania on the 18th day of November 19 74, and is now a qualified member in good standing.

Witness my hand and official seal
this 6th day
of February A.D. 19 80

Sally Ann Wise
Prothonotary

CERTIFICATE OF THE CLERK OF THE SUPREME COURT
OF THE
STATE OF ARIZONA

I, MARYANN HOPKINS-YOUNG, *Clerk of the Supreme Court of the State of Arizona, hereby certify that, according to the records of my office*

FRANCIS GERARD FLEMING

was on the 18th *day of* December, 1975 *duly admitted to practice as an Attorney and Counsellor at Law in all the courts of Arizona; that he has never been disbarred or suspended; that no disciplinary proceedings are pending against him; and that his name now appears on the Roll of Attorneys in this office as a member of the bar in good standing.*

Given under my hand and the seal of said Court this 4th *day of* February, 1980

MARYANN HOPKINS-YOUNG
CLERK

By Teresa Sanchez
DEPUTY

PENNSYLVANIA BOARD OF LAW EXAMINERS
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Philadelphia, Pennsylvania 19102
(215) LO 4-1724

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secretary and treasurer

November 26, 1979

Francis G. Fleming, Esquire
123 Hamilton Avenue
Glen Rock, N.J. 07452

Dear Mr. Fleming:

Pursuant to your request, this is to advise you that you sat for the Pennsylvania bar examination on July 31 & August 1, 1974 and received a scaled multistate score of 160.

Very truly yours,

Susan L. Anderson

SUSAN L. ANDERSON
Secretary

SLA: gm

COMMITTEE ON EXAMINATIONS
SUPREME COURT, STATE OF ARIZONA
234 N. CENTRAL, SUITE 858
PHOENIX, ARIZONA 85004
(602)252-4804

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WILLIAM E. PLATT, JR.
COOLIDGE

December 7, 1979

Mr. Francis G. Fleming
123 Hamilton Avenue
Glen Rock, New Jersey 07452

Dear Mr. Fleming:

Pursuant to your request of November 14, we wish to advise that you received the following scores on the multistate bar examination which you wrote in July 1975 in Arizona:

Scale score - 166
Raw score - - 159

We regret the delay in sending this information to you, but the files for this year are in storage and it took some time to locate the information.

Very truly yours,

Doris Odom

Mrs. Doris Odom
Secretary

dvo

National Conference of Bar Examiners
BAR EXAMINATION COMMITTEE
Tate Hall Columbia, Missouri 65211 - Tel. (314) 882-7562
Joe E. Covington, Director of Testing

John Germany, Chairman — Tampa, Fla.
Sumner T. Bernstein — Portland, ME.
John W. English — Erie, Pa.
Arthur Karger — New York, N.Y.
Armando M. Menocal III — San Francisco, CA.
Donald J. Rapson — Asbury Park, N.J.
Douglas D. Roche — Detroit, Mich.
Ex officio:
George T. Barrow — Houston, Tex.

January 23, 1980

Francis G. Fleming, Esq.
99 Park Avenue
26th Floor
New York, New York 10016

Dear Mr. Fleming:

In your recent letter you inquire about the acceptance of an MBE score made on an examination administered in another jurisdiction.

Two MBE scores are reported to the board of bar examiners in the jurisdiction where an applicant takes the MBE. One score is the raw score or the number of correct answers. The second is known as a scaled score, which is a statistically adjusted score based on the level of difficulty of this particular form of the MBE as compared to the standard that was established about seven years ago. This means the scaled score is intended to represent the same level of competence of the applicants from test to test. Everything else being equal, the applicant should make the same or almost the same score if he takes a new form of the test. That your scaled scores are 160 and 166 is an indication that this theory is correct.

There are eighteen jurisdictions which accept the transfer of MBE scores from another jurisdiction. They are: Alabama, Alaska, Arizona, California, District of Columbia, Florida, Idaho, Illinois, Maine, Maryland, Mississippi, Missouri, New Hampshire, New Jersey, South Dakota, Virginia, Wisconsin and Wyoming. States usually have some limitation, such as the two year limitation of New Jersey or the twenty-one month limitation of California.

Since the National Conference of Bar Examiners leaves such decisions up to the states, we take no position on the matter of transfer, but we do believe that a state is justified in accepting a transferred score.

I hope this will be of some assistance to you.

Sincerely yours,

Joe E. Covington
Director of Testing

JEC:bas

520.7 Admission without examination. (a) *General.* In its discretion the Appellate Division may admit to practice without examination an applicant who:

(1) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia or has been admitted to practice as an attorney and counselor at law or the equivalent in the highest court in another country whose jurisprudence is based upon the principles of the English Common Law; and

(2) (i) while admitted to practice as specified in paragraph (1) of this subdivision, has actually practiced for a period of at least five years:

(*a*) in its highest law court or highest court of original jurisdiction in the state or territory of the United States, in the District of Columbia or in the common law country where admitted; or

(*b*) in Federal military or civilian legal service in a position which requires admission to the bar for the appointment thereto or for the performance of the duties thereof; or

(*c*) in legal service as counsel or assistant counsel to a corporation in the state or territory of the United States, the District of Columbia or in the common law country where admitted; or

(*d*) in a combination or cumulation of service among the above categories of practice or legal service even if the government service, civilian or military, was not in a jurisdiction in which the applicant was admitted to practice, where the Court of Appeals has determined that such five years of combined or cumulative service is the equivalent of the practice required in clause (*a*) of this subparagraph; or

(ii) is a graduate of and has received a first degree in law from an approved law school as defined in section 520.3(b) of this Part and, for a period of at least five years immediately preceding the application for admission without examination, has been employed in this State or in any other state or territory of the United States or in the District of Columbia as a full-time member of the law faculty teaching in a law school or schools on the approved list of the American Bar Association and has attained the rank of professor or associate professor; and

(3) has had the substantial equivalent of the legal education which would have been required under section 520.3 of this Part, or its predecessor section or sections, to qualify applicant to take the New York State bar examination at the time of applicant's admission to practice in such other state, territory, district or common law country, or at the time of application for admission under this section; and

(4) is over 26 years of age.

(b) *Proof required.* An applicant for admission under this section shall file with the Clerk of the Appellate Division of the department in which the applicant resides or is employed full-time, or if the applicant does not reside and is not employed full-time in the State, with the Clerk of the Appellate Division of the Third Department:

(1) a certificate from the clerk of the highest court of the state, territory, district or foreign country in which applicant has been admitted to practice as an attorney and counselor at law or the equivalent, certifying to applicant's admission to practice and the date thereof; and

(2) in the case of an applicant seeking admission under subparagraph (a)(2)(ii) of this section:

(i) a certificate from the dean of the law school which employs or employed the applicant, certifying to the nature and extent of applicant's employment and the rank attained; and

(ii) a certificate from an approved law school as defined in section 520.3(b) of this Part, certifying to applicant's graduation and receipt of a first degree in law; and

(3) a certificate from the New York State Board of Law Examiners certifying that the applicant has shown, by satisfactory proof submitted to it that applicant has had the substantial equivalent of the legal education required by paragraph (3) of subdivision (a) of this section; and

(4) a report of the National Conference of Bar Examiners together with such other satisfactory evidence of character and qualifications as may be required.

(c) *Proof to be submitted and fee to be paid to New York State Board of Law Examiners.* The applicant shall submit to the New York State Board of Law Examiners such proof of compliance with the provisions of paragraph (3) of subdivision (a) of this section as the board may require and shall at the same time pay the board a fee of $100 by certified check or money order payable to the order of the board.

(d) *Discretion of Appellate Division.* The Appellate Division may in its discretion impose as a condition to admission such other tests of character and fitness as it may deem proper.

(e) *Admission pro hac vice.* An attorney and counselor at law or the equivalent from another state, territory, district or foreign country may, in the discretion of any court of record, be admitted *pro hac vice:*

(1) to participate in the trial or argument of any particular cause in which the attorney may be for the time being employed; or

(2) to advise and represent clients or participate in the trial or argument of any case, during the continuance of applicant's enrollment as a graduate student or graduate assistant, or during applicant's employment as a law school teacher in an approved law school in New York State, if applicant is engaged to advise or represent the client through participation in an organization described in subdivision 7 of section 495 of the Judiciary Law; or

(3) provided applicant is a graduate of an approved law school, to advise and represent clients and participate in the trial or argument of any case during the continuance of applicant's employment or association with an organization described in subdivision 7 of section 495 of the Judiciary Law, but in no event for longer than 18 months.

520.10 Application for waiver of rules. The Court of Appeals, upon application, may in its discretion vary the application of or waive any provision of these rules where strict compliance will cause undue hardship to the applicant. Such application shall be in the form of a verified petition setting forth the applicant's name, age and residence address, the facts relied upon and a prayer for relief.

520.7 Admission without examination*****

(e) *Admission pro hac vice.* An attorney and counselor at law or the equivalent from another state, territory, district or foreign country may be admitted *pro hac vice:*

(1) in the discretion of any court of record, to participate in the trial or argument of any particular cause in which the attorney may be for the time being employed; or

(2) in the discretion of the Appellate Division, to advise and represent clients or participate in the trial or argument of any case, during the continuance of applicant's enrollment in an approved law school in New York State as a graduate student or graduate assistant, or during applicant's employment as a law school teacher in an approved law school in New York State, if applicant is engaged to advise or represent the client through participation in an organization described in subdivision 7 of section 495 of the Judiciary Law or during employment with a District Attorney, Corporation Counsel, or the Attorney General; or

(3) in the discretion of the Appellate Division, provided applicant is a graduate of an approved law school, to advise and represent clients and participate in the trial or argument of any case during the continuance of applicant's employment or association with an organization described in subdivision 7 of section 495 of the Judiciary Law or during employment with a District Attorney, Corporation Counsel, or the Attorney General, but in no event for longer than 18 months.

No. 80-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In the Matter of the Application for Admission to the New York State Bar of

FRANCIS G. FLEMING,

Appellant.

On Appeal from the New York Court of Appeals

BRIEF OPPOSING MOTION TO DISMISS

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No. 80-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In the Matter of the Application for Admission to the New York State Bar of

FRANCIS G. FLEMING,

Appellant.

On Appeal from the New York Court of Appeals

BRIEF OPPOSING MOTION TO DISMISS

I. Introduction.

Capitalizing upon the absence of defined procedures governing the admission of an attorney to the New York State Bar pursuant to 22 N.Y.C.C.R. §520.7(a)(2)(i)(d), the Office of the Attorney General for the State of New York appearing on behalf of the N.Y. Court of Appeals, designated appellee, (hereafter New York) seeks to challenge appellant's invocation of the jurisdiction of this Court, arguing alternatively that the appeal is both premature and untimely. The former contention is based upon New York's candid admission that "the legal question sought to be presented by the appellant *has not yet been passed* on by any New York Court, much less the highest Court of the

State." (Motion at 6) (Emphasis added). The latter is based on the argument that appellant's efforts to obtain a decision on the question from the New York Court of Appeals caused the time for appeal to elapse.

Before attempting to resolve the procedural dilemma in which New York tries to place him, appellant wishes to note preliminarily that the N.Y. Court of Appeals was expressly requested to enter a formal judgment or order so that the time within which an appeal could be filed would be certain. (Jurisdictional Statement at 3a.) This request was denied. (Jurisdictional Statement at 1a.) Thus, the uncertainty that exists as to when this period commenced is apparently New York's preference.

Secondly, appellant did all he could to present the question to the New York Court of Appeals for a decision[1]. New York admits that the question of appellant's "qualifications in relation to [the Court] rules" was presented. (Motion at 7). No statute or case is urged as requiring more specificity. Nevertheless, however, New York *chose* not to pass on the question. In "denying" appellant's application, New York *in effect* decided, albeit *sub silentio,* against *all* appellant's arguments, including the federal question it now admits was not "passed on". *Street* v. *New York,* 394 U.S. 576, 895 S. Ct. 1354, 22 L.Ed. 2d 572 (1968). The validity of New York's utilization of residence as a criterion was clearly drawn in question, even if the question was not given the consideration it deserved. *Bryant* v. *Zimmerman,* 278 U.S. 63, 73 L.Ed. 184, 49 S.Ct. 61, 62 A.L.R. 785 (1928).

Lastly, as the Attorney General recognized, the N.Y. Court of Appeals has "retained" the "function" of determining whether an applicant's five years of multi-state experience is the equivalent of five years of pure intrastate practice for the purpose of establishing an attorney's qual-

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[1] Jurisdictional Statement 12a-15a.

ifications for admission. (Motion at 4). And, the N.Y. Court of Appeals is the "highest judicial Court in the State". (Motion at 6). Despite this, it is argued that "review" by inferior state courts is required. This argument, however, ignores the futility of appealing a decision of the highest state court, on a question over which it has expressly retained exclusive control, to an inferior court. And, it ignores what the N.Y. Court of Appeals itself has recently pointed out with regard to its exclusive province:

> In the design of the procedures for admission to practice law in our State, *the determination of general and legal educational qualification* has traditionally been kept separate and apart from the coordinate determination as to character and general fitness. Responsibility for the former *has been retained by the Court of Appeals* while responsibility for the latter has been delegated by the Court of Appeals and by statute to the several Appellate Divitions.
>
> *As to educational qualification,* for some years the Rules of the Court of Appeals have made provision for admission *either by taking* and passing *the Bar examination or,* as a substantial equivalent for the few applicants seeking admission on motion without examination, *by both admission and five years' practice in another common-law jurisdiction.* Compliance with either alternative ends the inquiry with reference to general and legal educational qualification. Any supplement or substitute requirement as to this aspect of the applicant's eligibility for admission must be made by provision of the Rules of the Court of Appeals. There is none now.
>
> *The authority which has been delegated to the Appellate Divisions is limited to the area of moral character and individual integrity.* Whatever the depth of the entirely understandable concern and convic-

> tion of the members of the several Appellate Divisions that unqualified persons should not be admitted to practice in our State, the delegated jurisdiction of these courts is nonetheless limited. *Shaikh* v. *Appellate Division,* 39 N.Y. 2d 679, 385 N.Y.S.2d 514, 516 (1976) (Emphasis added).

It is the failure to resort to the "conventional procedure of applying to the Appellate Division for admission . . ." (Motion at 8) which New York suggests, among others, is fatal to this appeal. In appellant's view, however, because the question relates to his general legal and educational qualification, the exercise of an Appellate Division's jurisdiction would be futile. *Gordon* v. *Committee on Character and Fitness,* 48 N.Y.2d 266, 422 N.Y.S. 2d 642, 397 N.E.2d —— (1979) and the other cases cited by New York for the proposition that the Appellate Divisions can act on an application for admission relate to the "conventional procedure", not the type of admission based upon admission in another common law jurisdiction. *Shaikh* v. *Appellate Division, supra.*

II. The outcome of any additional state proceedings, even if available, is pre-ordained and the decision below is final as to the substantive questions raised.

It is undisputed that "[a] final judgment by the highest court of the state in which a decision can be had has been a prerequisite for the review of a state court judgment, by the Supreme Court, since the Judiciary Act of 1789." 12 *Moore's Fed. Prac.* ¶508.01[1] (1980). This requirement is, however, a practical and pragmatic one, not governed by "technicalities". *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 124, 65 S.Ct. 1475, 89 L.Ed. 2092, 2097 (1945). It is based on policies of federalism intended to avoid piecemeal review, advisory opinions, and unnecessary "federal intrusion in state affairs". *North Dakota*

State Board of Pharmacy v. *Synder's Drug Stores, Inc.*, 414 U.S. 156, 159, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973).

However, a decision *is* appealable when it *"effectively determines* the litigation, leaving nothing to be *judicially* decided." 12 *Moore's Fed. Prac.* ¶508.01[3] (1980) (emphasis added).

Since the decision appealed from was rendered by New York's *highest* Court, the outcome of any further proceedings in inferior courts is preordained. New York's inferior courts are not free to review a determination of the Court of Appeals. *N.Y. Criminal & Civil Bar Ass'n.* v. *State,* 70 A.D.2d 716, 416 N.Y.S.2d 431 (App.Div. 1979). *See also, Silverberg* v. *Dillon,* 73 A.D.2d 838, 423 N.Y.S.2d 760 (1979).

This Court's pragmatic approach to the question of finality was fully analyzed in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). A judgment is deemed final within the meaning of 28 U.S.C. §1257(2) if the outcome of future state court proceedings is pre-ordained or conclusive. *See e.g., New York* v. *Cathedral Academy,* 434 U.S. 125, 129 n.4, 98 S.Ct. 340, 54 L.Ed.2d 346, 351 (1977). An Appeal can be taken at the time "the case is for all *practical* purposes concluded. . . ." *Cox Broadcasting* v. *Cohn, supra* at 479, 43 L.Ed. at 398 (emphasis added). Additional state proceedings which:

> "would be no more than a few formal gestures leading inexorably towards [the same result], and then another appeal to the [State's highest court] . . . whereupon the case could then once more wind its weary way back to the [U.S. Supreme Court] as a judgment unquestionably final and appealable . . . would be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this court [and] result in a completely unnecessary waste of time and energy. . . ." *Mills* v. *Ala-*

bama, 384 U.S. 214, 217, 86 S.Ct. 1434, 16 L.Ed.2d 484, 487 (1966).

New York concedes that its decision was final, but argues that because it was administrative or "non-judicial" an appeal does not lie. Motion at 8. This argument, however, ignores in *In Re Summers,* 325 U.S. 561, 89 L.Ed. 1875, 65 S.Ct. 1307 (1944) which expressly rejected jurisdictional arguments based on this type of characterization. *Summers* is virtually indistinguishable. The Supreme Court of Illinois had denied the application of a conscientious objector for admission to the Illinois Bar. The decision was communicated by letter from the Chief Justice.[2] An appeal to this Court followed. The argument was made by the Justices of the Illinois Supreme Court that no appeal could be taken because there were no adverse parties below, because "no entry was placed by the Clerk in the file, on the docket or in a judgment role . . .", and because "no process issued [nor was] any appearance . . . made". *Id.* at 567, 89 L.Ed. at 1800. This court rejected these arguments holding that the denial of admission constituted a basis for an appeal because judicial *power* was exercised. "The form of the proceeding is not significant. It is the nature and effect which is controlling." *Id.* The New York Court of Appeals has long treated its consideration of an attorney's educational qualifications as a *judicial* matter. *In re Cooper,* 22 N.Y. (8 N.Y.S.) 67 (1860); *Shaikh* v. *Appellate Division, supra.* This view has never been expressly modified; and *Cooper* has been cited with approval as recently at 1976. *Davidson* v. *N.Y. State Board of Bar Examiners,* 86 Misc.2d 744, 382 N.Y.S.2d 418, 420 (1976).

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[2] *Burns* v. *Ohio,* 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959) holds that a *letter* from the *Clerk* advising a litigant that court papers would not be accepted without the payment of a docket fee was deemed to be a final judgement by this Court within the contemplation of 28 U.S.C. §1257.

Furthermore, it is not clear that additional state court proceedings are available in the inferior state courts of New York.[3] There is no recorded case which establishes that any final determination of the N.Y. Court of Appeals can be reviewed in the inferior courts. Furthermore, judicial review of the bar admission process in New York is not favored. Even the final determinations of the N.Y. State Board of Law Examiners, *undeniably an administrative agency,* cannot be reviewed. *Davidson* v. *N.Y. State Board of Law Examiners, supra.* The four month limitation period for seeking review of an administrative agency has expired. Thus, it is questionable whether additional state court proceedings are even available.

Moreover, assuming that appellant sought review of the Court of Appeals decision and the inferior courts held they were powerless to review the highest court of the state, and that reasoning was ultimately affirmed on appeal by the Court of Appeals, review by this Court could then be precluded as that decision might be sustainable on purely state grounds. Appellant's federal claims should not be jeopardized in this manner. *North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc., supra; Cox Broadcasting Corp.* v. *Cohn, supra.*

Appellant recognizes that it is unfortunate that the N.Y. Court of Appeals did not "pass on" the questions presented to it. However, "a state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in

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[3] Although the Office of the Attorney General for the State of New York undoubtedly is acting appropriately in opposition to this appeal, it does so as an advocate. The fact that it appears on behalf of the N.Y. Court of Appeals, however, should not make its characterization of New York law conclusive as would probably be the case if the Court of Appeals had held in an opinion or decision that additional proceedings were available.

the same manner." *Williams* v. *Georgia*, 349 U.S. 375, 383, 75 S.Ct. 814, 99 L.Ed. 1161, 1171 (1955). This Court's exercise of jurisdiction in this case will not undermine the principles of federalism which disfavor premature review of state proceedings. The federal question was expressly and fully presented to the N.Y. Court of Appeals, *Street* v. *New York, supra*. New York declined to decide the question. Why is not known, but its failure should not bar this Court's consideration of the question.

Unless this Court focuses upon the practical limits of the power of New York's inferior courts, considerable mischief indeed will have been done. The absence of defined procedures relating to multi-state admission will have permitted a fair and substantial question to remain unanswered.[4]

III. The Record does not disclose that all questions raised below were fully adjudicated until September 4, 1980, Notice of Appeal was timely filed on November 26, 1980.

The Notice of Appeal was filed on November 26, 1980, within 90 days of the letter of the Clerk of the Court dated September 4, 1980, stating among other things that a formal judgment or order would not be entered. (Jurisdictional Statement at 1a). No challenge respecting the timeliness of the notice in relation to this document is made.

Nevertheless, New York argues that the Notice of Appeal was untimely asserting that an earlier letter received by appellant from the Clerk of the Court dated July 14, 1980 (Jurisdictional Statement at 4a) constituted a final decision in this matter, and, that appellant's letter in re-

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[4] New York has not argued that an adequate independent state ground supports its decision, nor that a substantial federal question does not exist.

sponse dated August 14, 1980 requesting "reconsideration of [the] application and if it is denied, . . . some formal articulation of the basis of the denial and a judgment or order" (Jurisdictional Statement at 3a) was ineffective to "revive" the time for appeal. (Motion at 8).

In appellant's view, the first letter was not a final judgment because it does not disclose that the questions were "fully adjudicated and that the adjudication [was] not subject to further review by a state court." 12 *Moore's Fed. Prac.* ¶508.01[10] (1980). Finality must be determined on a practical and pragmatic basis, rather than on the basis of mechanical technicalities. *Id.* This letter does not state that all questions were decided; rather, it states only that appellant's request "for waiver of strict compliance" of the Court's rules was denied. (Jurisdictional Statement at 4a). It makes no reference to appellant's substantive claim of *entitlement* pursuant to the strict provisions of the rules, nor does it address the federal issues presented.

Secondly, this letter does not disclose that a formal judgment would not be entered. Certainly, appellant should not be penalized because he requested certainty as to the time for appeal.

Although New York may have intended the July 14, 1980 to be a final decision, this intention was never expressed or implied. It became clear that New York had effectively determined *all* questions only when it stated so on September 4, 1980. Treating the first letter as final will inpose an obligation on litigants to file protective notices of appeal and discourage attempts to finalize matters in the state courts.

The Supreme Court Rules 11.3 provides that "the time for filing the notice of appeal runs from the date the judgment or decree sought to be reviewed is *rendered*. . . ." (Emphasis added). A decision cannot be rendered until it is transmitted and communicated. Even if New York

finally decided the question as of July 14, 1980, it failed to communicate its decision until September 4, 1980. Thus, the record does not disclose complete adjudication prior to the Clerk's second letter.

New York's interpretation of the finality rule is contrary to the practical and pragmatic approach adopted by this Court, and it undermines the very principles of federalism which are intended to minimize federal intrusion into its affairs.

The issue in this case is not one of revival; it is whether a state can *shorten* the time within which an appeal can be taken by its subsequent act of characterizing its former unclear and informal communication as having been final. If it can, the concept of finality will have become unworkable for want of certainty.

IV. Conclusion.

For all the foregoing reasons, New York's motion to dismiss this appeal should be denied.

Dated: New York, New York
February 11, 1981

Respectfully submitted,

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Certificate of Service

FRANCIS G. FLEMING, a member of the Bar of the United States Supreme Court, whose entry of appearance has been filed with the Clerk of the United States Supreme Court, being first duly sworn and placed upon his oath states that forty copies addressed to the Clerk of the U.S. Supreme Court, Washington D.C. 20543 and three copies of the Brief Opposing Motion to Dismiss were deposited February 11, 1980 in a U.S. Post Office or mail box with first-class postage prepaid, addressed to the following person:

Franklin K. Breselor
Robert Abrams
Attorney General of the
State of New York
The Capitol
Albany, New York 12224

FRANCIS G. FLEMING

Sworn to before me this
11th day of February, 1981

SONIA AGUIRRE
Notary Public
State of New York
No. 01A5056610
Qualified in Rockland County
Cer. Filed in New York Cty.
Commission Expires March 30, 1982